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No. 428

In the Supreme Court of the United States

OCTOBER TERM, 1945

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON THE MERITS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted district court (R. 33–36) is reported in 59 F. Supp. 738. The report of the Interstate Commerce Commission (R. 237–255) appears in 258 I. C. C. 371.

JURISDICTION

The final decree of the district court was entered on April 9, 1945 (R. 40). The petition for ap-

peal was filed on June 1, 1945, and the appeal was allowed on the same day (R. 41). Probable jurisdiction was noted on October 15, 1945 (Re. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission, in determining certain questions arising in an ordinary lawsuit in response to this Court's holding that the questions were committed to its administrative judgment exceeded in any way its constitutional or statutory authority or acted without supporting evidence or contrary to evidence.[1]

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, *infra*, pp. 36–39.

STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of California, dismissing a suit brought by the appellants to set aside certain action of the Interstate Commerce Commission. The

[1] Based on the understanding that the Court has not finally decided that it has jurisdiction of the cause, the Government and the Commission respectfully refer the Court to their original brief dealing with that question.

action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371 (R. 237), which proceeding was instituted in response to this Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars.

Appellant El Dorado Terminal Company is a wholly owned subsidiary of appellant El Dorado Oil Works (hereinafter called the Oil Works), which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation (hereinafter called the Car Company) is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products (R. 238).

On September 28, 1933, the Car Company and the Oil Works entered into an agreement under which the former leased to the Oil Works 50 tank cars, designated as "permanent" cars, at a rental of $27.50 per car per month. This lease, a renewal of a previous one, was for the three-year period from January 1, 1934, to December 31, 1936. The Car Company agreed to supply the Oil Works with such additional tank cars as it might need

for the shipment of its products; these additional cars to be ordered by the Oil Works from the Car Company from time to time, as needed. The rental for the additional cars was at the rate of $30 per car per month for the time such cars were in the service of the Oil Works (R. 52–57).

The agreement provided that the Car Company would collect from the railroads all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the Oil Works "all mileage earned by said cars while in the service" of the Oil Works "according to and subject to all rules of the tariffs of the railroads" (R. 55–56).

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the Oil Works under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars (R. 110). It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company (R. 52). The mileage was not, therefore, under the terms of the tariff, payable to the Oil Works.

The terms of the agreement were observed for a period of approximately six months or until July 2, 1934, on which date the Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates (R. 239).

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the Oil Works any part of the mileage allowances in excess of the rental reserved in the lease. Until that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the Oil Works. Thereafter, the Car Company collected the mileage from the railroads, credited the Oil Works with the amount of the rental due, and retained the balance, refusing to pay it over to the Oil Works on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the Oil Works. It appears that both before and after the change

in the practice the aggregate of the mileage earnings each month exceeded the rental due from the Oil Works. Throughout the entire period, therefore, the Oil Works paid nothing to the Car Company for the use of the cars (R. 234, 239).

In June 1935, the El Dorado Terminal Company, as assignee of the Oil Works (its parent company), brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the Circuit Court of Appeals, which held (104 F. 2d 903) that the Terminal Company was entitled to the full amount claimed. This Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, that the "question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commision, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices

under the terms of the Act." The judgment of the Circuit Court of Appeals was reversed and the cause remanded to the District Court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U.S. at p. 433) (R. 239–240).

Pursuant to a petition subsequently filed with it by the Oil Works and its assignee (R. 43–52) the Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) What findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist. (R. 58.)

Numerous common carriers by rail were made respondents in the proceeding (see R. 241). Following a hearing (R. 59–233), in which the said

respondents and the Car Company participated, the Commission issued its report (R. 237–255). The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of this Court in the *El Dorado Terminal Co. Case*, that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C., at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936 (R. 249–250).

Appellants thereupon brought this suit under the Urgent Deficiencies Act; they assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding (R. 260–261), constituted an "order" within the meaning of that Act [2] and asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evi-

[2] Three-judge district courts (28 U. S. C. 47) have jurisdiction of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)).

dence. The United States and the Commission defended on the merits, but also insisted that the District Court, specially constituted as a court of three judges, was without jurisdiction. In its decision (R. 33), the District Court sustained the latter contention and dismissed the complaint for lack of jurisdiction.

At the first hearing on the appeal to this Court the brief and argument of the United States and the Commission were directed to the support of the ground on which the District Court based its decision. The brief and argument of appellants were also largely addressed to the jurisdictional question.

On February 11, 1946, the case was restored to the Docket for argument on the merits "on the assumption that the Court has jurisdiction."

ARGUMENT

I. The Commission's action was responsive to this Court's decision and was within its constitutional and statutory authority

The appellants contend that the findings and determinations made by the Commission in response to this Court's decision in the *El Dorado Terminal Co. Case*, *supra*, not only failed to determine the administrative question referred to by the Court but assumed in excess of its constitutional and statutory authority to decide the civil action in assumpsit pending before the District Court. The administrative question referred to

they assert, was not that determined by the Commission but was the question of what was the reasonable uniform allowance applicable to all furnishers of tank cars as a class to be prescribed for publication in the carriers' tariffs. Apparently the appellants do not urge that, once the Commission had determined such question of the uniform allowance applicable to all furnishers of tank cars, the reasonable allowance so determined would be determinative of the question in issue in the action in assumpsit as to the amount of allowance lawfully due the Oil Works. On the contrary, they in effect insist that any determination of that question by the Commission would constitute a usurpation of judicial functions.

In the *El Dorado Terminal Co. case* (308 U. S. at p. 429), this Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transporting its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. Any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate. Section 15

[1] Section 6 (7), Interstate Commerce Act, and section 1 Elkins Act (Appendix, *infra*, pp. 36, 37).

(13) of the Interstate Commerce Act (Appendix, *infra*, p. 37), while authorizing allowances to shippers furnishing services or instrumentalities in connection with their shipments, specially provides that such allowances "shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers * * *." (See 258 I. C. C. 371, 378.)

In *In re Private Cars*, 50 I. C. C. 652, the Commission, following a general investigation into the practice whereby shippers requiring special types of freight cars obtained and furnished such cars for the transportation of their products, found that the practice was not unlawful but worked to the benefit both of shippers and carriers. In connection with privately owned tank cars so furnished to the railroads, the Commission therein prescribed as compensation to the shipper an allowance of 1 cent a mile. As the report in that case shows, this allowance was based on the average cost of car ownership, consisting of such fairly consistent items as interest on investment, depreciation and the like.[4] In its later report, in

[4] In its report in the present case (258 I. C. C., at p. 379), the Commission refers to its report in *In re Private Cars*, 50 I. C. C. 652, saying we there "found that a reasonable allowance for the use of privately owned tank cars would be 1 cent a mile. The figure was based on the average cost of car ownership. In that proceeding the car owners conceded

the *Refrigerator Car Case*, 201 I. C. C. 323, the Commission gave particular consideration to the shipper-lessees of cars and pointed out that the rentals charged by the car companies, which are the principal costs of the shippers in connection with the cars, varied greatly, being governed by no principle or rule except that of the severe competition between the car companies. Because of these conditions and others, including the showing that the rentals are "usually fixed sufficiently low so that the mileage earnings [either paid directly, or through the car companies, to the shippers] will exceed the cost to shippers" (201 I. C. C. 323, 381), the Commission found that such payment of allowances to shipper-lessees in effect constituted rebates or concessions from the published rates and it condemned the payment to or receipt by shipper-lessees of car-mileage allowances in excess of their rental payments and other actual costs.

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that they were not properly entitled to make a profit on their cars used by the carriers. They demanded, as a rule, that the entire cost to them, together with interest on their investment, should be covered by payment for their use. * * *"

[5] In *In re Private Cars*, 50 I. C. C. 652, the Commission gave its approval generally to the use by the railroads of cars furnished by the shippers whether the cars were owned by the shippers or leased from the car companies, but the record, apparently, did not disclose the practices in connection with shipper-leased cars which are described in the later *Refrigerator Car Case*, 201 I. C. C. 323.

In the present case, the Oil Works leased only 50 cars, these being designated as "permanent" cars and the rental called for being $27.50 per car per month. The Car Company, however, agreed to supply such additional cars as the Oil Works might from time to time need, the rental for these being at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (See Statement, *supra*, pp. 3, 4.) Such an arrangement for a supply of additional cars with rentals based only on the time the cars are in the service of the shipper enables the limiting of the number of permanent cars the shipper would otherwise have to lease to meet its needs and pay for at fixed monthly rentals. It is this, particularly as coupled with a low, competitively-induced basis of rentals, that may result in a "shipper-lessee" receiving concessions from the rates where, as here, the allowances paid to it for furnishing the cars to the railroads bear no relation to its costs in obtaining the cars as reflected by its rental payments.

In the case of the "shipper-lessee" here (the Oil Works), the possibility that the arrangements might have had the above result was recognized

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[8] In contrast to this, a "shipper-owner" (a shipper depending upon cars of its own ownership) must own not only as many cars as the ordinary needs of its business require, but, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership, including maintenance, taxes, depreciation, and the loss of mileage whenever any of the cars stand idle.

by this Court's statement in the *El Dorado Terminal Co. case*, 308 U. S. at p. 432, that "as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission."

As shown above the appellants contend substantially that the Commission, by determining the amount of allowance lawfully due the Oil Works and by its findings as to the practices under the lease agreement had assumed to decide the pending civil action in assumpsit; that this Court had not intended that it make such determination and findings but instead had expected it to determine and prescribe for publication in the carriers' tariffs a reasonable uniform allowance to apply to the furnishers of tank cars generally.

In the *El Dorado Terminal Co. case*, this Court makes plain that the administrative questions referred to as involved in the action in assumpsit are the questions particularly in issue in that ac-

In their petition to the Commission (R. 240, 43-52), the appellants neither asserted that the administrative question referred to by the Court was the question of the reasonable uniform allowance applicable to the furnishers of tank cars generally; nor did they ask the Commission to determine and prescribe such character of allowance. At the hearings before the examiner, appellants' counsel raised no issue of that sort either expressly or by proffer of evidence but, instead, sought, apparently, to confine the evidence within narrow bounds (R. 206-211). As stated in their brief (p.

tion, that is, the questions as to the amount of allowance lawfully due the Oil Works and as to the legality of the practices of the parties (308 U. S. 422, 428, 431, 432). Also, this Court's opinion in that case clearly points to the statutory provisions which clothe the Commission with authority in the premises. Referring (p. 429) to section 15 (13) of the Interstate Commerce Act, the opinion states that that provision "governs the payment of allowances for private cars and invests the Commission with authority to find and declare what allowances are just and reasonable." Furthermore, the opinion, while recognizing that the defense set up in the action in assumpsit was based on the Elkins Act (p. 426) makes special reference (p. 431) to the Commission's findings in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. There (pp. 382–383), the Commission acting under section 6 (7) of the Interstate Commerce Act,* found that the payment, either

—), the appellants, in petitioning the Commission for rehearing, set up as one of the grounds therefor, their contention made here respecting the determining and prescription of uniform allowances, and it appears also (although not of record here) that their counsel expressed such contention in the oral argument before the Commission.

* Section 6 (7) of the I. C. Act is given in full in the Appendix. Similarly as the Elkins Act, it is regarded as holding the carriers to a strict duty to prevent rebating by any device or means. The latter part of the paragraph provides substantially:

"* * * nor shall any carrier charge or * * * receive a greater or less or different compensation for such

direct or through car owners, of allowances to shipper-lessees in excess of their rentals and other actual costs results in such shippers receiving transportation at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates. This finding of the Commission in the case of refrigerator cars is referred to by this Court in the *El Dorado Terminal Co. case, supra*, p. 431, with apparent approval as a standard for the Commission's use in determining whether or not the receipt by the Oil Works of the full sums collected would constitute more than a just and reasonable allowance and thus be unlawful. For the Court there says:

> If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers, or own their own cars. The Commission has

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transportation * * *, or for any service in connection therewith * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

found that, in the case of refrigerator cars, held under similar leases, this has been the case.

The above finding does not mean, as suggested by appellants (Orig. Br., p. 13), that the Oil Works was entitled to some profit (so long as not substantial), but, instead, means that, if the Commission should find that the profit made by the Oil Works on leased cars was substantial, thus showing that it was in the result obtaining transportation at lower cost than shippers generally under the rates, it might find that the receipt by the Oil Works of such full sum was unlawful. It would not be until then that the Commission would go into and determine the question of what was the actual just and reasonable allowance lawfully due the Oil Works.

As support for their contention that the Commission was expected to determine a uniform tank car allowance and was required to prescribe the same as an allowance applying *in futuro*, appellants cite section 15 (13) of the Act, which, prior to the amendments to the Act made in 1940, provided substantially:

> If the owner of property transported x x renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on

> its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers x x x and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders provided for under this section."

The above paragraph (now (13)) of section 15 was added to the Act by the Hepburn amendments of 1906 (34 Stat. 590) which for the first time conferred on the Commission the quasi-legislative authority of prescribing rates, practices, etc., for the future, but, while the paragraph, of course, includes the power to prescribe allowances for future application, it is apparent that it is not limited to authority of such legislative kind.

The Hepburn amendments to the 1906 Act, in amending section 15 so as to empower the Commission to prescribe future rates, used language susceptible of no other meaning, that is, it empowered the Commission "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed" (34 Stat. 589). In contrast, the amendment to section 15 dealing with allowances neither contains the words "will be" or the words "to be thereafter observed." The language, therefore, does not restrict the Commission to the determining and prescription of future allowances and, since both amendments were made to section 15 at the same time, there is every reason not to

construe the language as imposing such restriction (cf. *Mitchell Coal Co.* v. *P. R. R.*, 230 U. S. 247, 258, 259).

The shipper-lessee in the present case—the Oil Works—had, at considerable expense, furnished facilities of transportation—tank cars—which the carriers were under obligation to provide as part of their public service (308 U. S. 422, 428).* Accordingly, as held by this Court (p. 431), the Oil Works was entitled to a just and reasonable allowance under the plain terms of section 15(13). It is evident from the terms of that paragraph that the allowance so due the Oil Works could not lawfully be more than just and reasonable and also that no tribunal, or body other than the Commission was empowered to say what was such just and reasonable allowance. It follows, therefore, that since the determining of the question by the Commission was wholly within the language of the paragraph, there is no good reason to construe that language otherwise than authorizing the Commission to do so.

* In addition to the first paragraph of section 15 and the paragraph dealing with allowances, the 1906 Act added to section 15, among others, a paragraph (now (14)) which provided (34 Stat. 590):

"The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this Act."

Neither paragraph (1) nor paragraph (13) of section 15 require the Commission to act in its legislative capacity (Cf. sec. 13 (4)). They simply authorize it to do so. While

As mentioned in the prior brief (pp. 36–38) filed by the United States and the Commission, the decision of the circuit court of appeals in the action in assumpsit reviewed by this Court in the *El Dorado Terminal Co. case*, held that the Oil Works was entitled to the published allowance of 1.5 cents on tank cars. It, apparently, recognized that under its decision the Oil Works would "reap" a profit from its transaction of leasing and furnishing cars but, in its view, the published allowance was applicable and, therefore, the legal amount due. So far as the resulting profit was concerned, it pointed to the fact that, shippers, in furnishing cars to the railroads, were bound to have differing costs and yet, since allowances were required to be published, it was necessary for the Commission to arrive at, and prescribe, uniform allowances based on average costs. Further in this connection it said that it "is inevitable, if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained" that a uniform maximum allowance fixed by the Commission and published in the

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Congress, by the Hoch amendments, clothed the Commission with authority of legislative nature, it, of course, did not intend, by that action, to take from the Commission its administrative authority of other kind in the enforcement and carrying out of the Act's provisions. While here, similarly as in the *Refrigerator Car Case*, the Commission made no order, the said paragraph (14) shows the scope of its authority in the premises.

tariffs will "in many cases yield a profit to certain shippers" (104 F. 2d at pp. 909, 911).

This Court, in its opinion in the *El Dorado Case* (308 U. S., at pp. 430, 431) agrees for the most part with the reasoning of the circuit court of appeals but, as pointed out in the prior brief (p. 37), it shows that it is not in accord with that court's view that there is any such "intent of uniformity of charge by fixed rates, applicable to all [shipper] suppliers" of cars as would require or justify the limiting of the number of published allowances to an extent that the allowances "would in many cases yield a [substantial] profit to certain shippers" (104 F. 2d at pp. 909, 911).

In the paragraph of the opinion in the *El Dorado Co. case* (pp. 429–430) above referred to, this Court was, as stated, giving consideration to the reasoning by which the circuit court of appeals arrived at its conclusion that the published 1.5-cents allowance was the applicable and legal allowance due on account of the cars furnished by the Oil Works, as involved in the action in assumpsit. This appears from the substance of the paragraph and also from the succeeding paragraph, in which it is said substantially, that it results that the shipper in this case was permitted by law to furnish freight cars and to be paid a reasonable allowance; that the law requires that the amount and conditions of payment of such allowance be set forth in a published tariff and,

if this is not done, permits the shipper to complain to the Commission to the end that a proper allowance be ascertained and made effective in a tariff schedule. The paragraph then says, "In the present case this was not done. *Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it.*" [Italics supplied.]

In the next succeeding paragraph (pp. 430, 431), the opinion points out that, so far as the 1.5-cents published allowance was concerned, the "conditions" or rules in the published tariffs precluded the carriers from paying that allowance to the Oil Works. The Court then says:

> The Circuit Court of Appeals has held, and we think correctly, that the shipper—the Oil Works—furnished the cars to the carrier in the present instance. The petitioner did not. The shipper was then entitled, under the plain terms of section 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility. * * *

The above holding, in and of itself, seems a complete answer to appellants' contentions. This Court had previously stressed the fact that the carriers were under obligation to furnish the cars as part of their public service. In the court case and in the Commission proceeding, an important part of appellants' evidence was directed to show

ing that the carriers did not have readily available the type of tank car necessary for the Oil Works' products. Accordingly, it followed that under the plain terms of section 15 (13) the Oil Works was entitled to a just and reasonable allowance; and, as above stated, it is evident from the terms of the paragraph that no other tribunal or body other than the Commission is authorized to determine and say just what was such reasonable allowance. If the Oil Works had terminated its business and discontinued its shipments, it still would have been entitled to a reasonable allowance for the cars furnished, as involved in the action in assumpsit.

A. The considerations that the payments to the Oil Works were made by the Car Company, not by the carriers, and that the consignees may have paid and borne the freight charges are immaterial

The appellants urge in effect (Br. 17–18) that the fact the allowance payments to the Oil Works were made by the Car Company and not by the carriers takes the case out of the statutory inhibitions of the Elkins Act and section 6 (7) of the Interstate Commerce Act.

In the *Refrigerator Car Case*, the Commission found that the payment to shipper-lessees either direct or through car owners of allowances in excess of their rentals and other actual expenses resulted in such shippers receiving transportation at lower rates than shippers generally who use cars furnished by the carriers, and at less than the published rates. This finding of the Commis-

sion is referred to by this Court in the *El Dorado Terminal Co. case* (308 U. S. 422, 431) with clear approval as a standard for the Commission's use in determining whether or not the receipt by the Oil Works of the full sums collected by the Car Company would constitute more than a just and reasonable allowance and thus be unlawful. The standard, as stated by the Court, is to the effect that, if it appears that the Oil Works is making a substantial profit on leased cars and is thus shown to be obtaining transportation at lower cost than shippers who use cars assigned by the carriers or own their own cars, then the Commission may declare that the payment to, or receipt by, the Oil Works of such full sum would be unlawful. This does not mean, as suggested by appellants (Orig. Br., p. 13), that the Oil Works was, nevertheless, entitled to some profit—some profit just short of one that would be substantial. On the contrary, once the Commission declared or found, such unlawfulness, its administrative judgment, was brought into play to determine what was in fact the just and reasonable allowance due the Oil Works for the cars it had furnished the carriers.

It will be seen that section 15 (13) and section 6 (7) of the Interstate Commerce Act along with the principles embodied in the Elkins Act are involved in the above determinations of the Commission, and this has the sanction of this Court's

statement (308 U. S. 422, 432) to the effect that the policy of the Act is to entrust to the Commission's determinations the matter of "reasonable allowances and practices which shall not offend against the prohibitions of the Elkins Act." The authority placed with the Commission by section 15 (13) to say whether or not an allowance to a shipper furnishing cars is more than a just and reasonable allowance for his contribution to the transportation under the rates he must pay, is its basic authority in any such case." In reaching its determinations, the Commission gives consideration to the prohibitions of the Elkins Act as well as those of section 6 (7) of the Interstate Commerce Act (R. 247), this because the purposes and prohibitions of the Elkins Act are part of the criteria which have been embodied in the standard of justness and reasonableness set up by section 15 (13) from the time of its enactment in 1906. Such standard, nevertheless, is factual and, being such, there was no constitutional inhibition precluding Congress from setting it up as a guide for the Commission's administrative judgment. Its action in this respect was not novel. As repeat-

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[11] In *U. S.* v. *Wabash R. Co.*, 321 U. S. 403, 412, similarly as here, the basic finding was a factual finding with respect to a question committed to the Commission's administrative judgment. Cf. *U. S.* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. The Commission proceedings involved in both these cases were parts of the general proceeding in *Ex Parte 104*, as was also the *Refrigerator Car Case*, *supra*.

edly stated by this Court, the purposes and policy of the Transportation Act, 1920, are embodied in various of the Act's standards administered by the Commission. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25.

Since the Commission is expected to give effect to the purposes of the Elkins Act, it necessarily must look to the interpretations placed on that Act by the courts. Speaking of the question of whether rebating may be accomplished through private car companies, the Commission says in its report (R. 244–245):

> Unlawful rebates, concessions from the published and filed tariffs, and discriminations may be brought about by the act of a person who is not directly in the relation of carrier and shipper, as well as by payments by the carrier to the shipper directly. This is illustrated in *Union Pac. R. Co.* v. *United States*, 313 U. S. 450, and *Spencer Kellogg & Sons* v. *United States*, 20 Fed. (2d) 459.

To the same effect see: *Interstate Commerce Commission* v. *Reichmann*, 145 Fed. 235; *Ohio Tank Car Co.* v. *Keith Railway Equipment Company*, 148 Fed. (2d) 4; (certiorari denied Oct. 8, 1945); *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 463.

The consideration that the consignees may have borne the freight charges was raised in the Commission proceeding, and was found by the Com-

mission to be immaterial (R. 246). This finding or conclusion, is fully supported by the decisions of the courts. *Ohio Tank Car Co.* v. *Keith Railway Equipment Company*, 148 Fed. (2d) 4, 7 (certiorari denied Oct. 8, 1945); *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25; *Elgin, J. & E. Ry. Co.* v. *United States*, 253 Fed. 907, 911.

II. The Commission's findings and conclusions are fully supported by the record

The only claim by the Oil Works of actual expenses (other than the rentals) incurred in connection with its transaction of leasing and furnishing cars to the railroads was on account of the special cleaning and preparation of the cars which the Oil Works regarded as necessary for the carriage of its particular products; and this claim, it is believed, is fully answered by the Commission's report wherein the Commission says (R. 243):

> The petitioners show no item of cost in furnishing the tank cars to the carriers, for which the latter were liable under their obligations as common carriers, other than the rentals. They say that they bore or assumed an average expense of $27.66 for special cleaning and preparation of the cars used. It appears that the railroads, upon request, cleaned in the usual manner all the tank cars furnished. Petitioners do not assert that the Tank Car Corporation or the railroad carriers were obligated to per-

form the special cleaning services, and, at most, they claim that they incurred an expense which should be given consideration in determining their costs. Such special cleaning and preparation as was given the tank cars furnished was not a common carrier obligation of the railway carriers, and consequently the owner of the goods shipped may not be paid an allowance therefor or recompensed by the railroad carriers. The Oil Works undoubtedly would have had to stand the same expense whether it owned the cars, or even if they were furnished by the carriers. *Suitable Cars for Loading Flour*, 128 I. C. C. 442, 444, and cases there cited.

It has been pointed out above (p. 18, *supra*) that the Commission, in finding here (R. 245–246, 248) that the Oil Works would under its contract with the Car Company reap a substantial profit, simply finds and declares that, if the Oil Works were to be paid, or to receive, the full sums collected by the Car Company, the amount would be more than a just and reasonable allowance and thus unlawful as violative of section 15 (13), section 6 (7) and the purposes of the Elkins Act. As stated, this does not mean that the Oil Works was, or is, entitled to "some profit." The finding is a declaration of unlawfulness and, following such declaration, the Commission determined and found just what was the just and reasonable allowance due the Oil Works for the cars furnished

the carriers. Such determination was not, of course, based on the average costs of furnishers of tank cars [12] but on the actual costs of the individual shipper—the Oil Works. That that was the proper basis, seems borne out, not only by the Court's reference to the *Refrigerator Car Case*, but also by its later statement (308 U. S. 422, 432) that:

> * * * The Circuit Court of Appeals, without supporting evidence in the record

[12] In *In re Private Cars*, *supra*, the Commission, in speaking of the publication of allowances on tank cars and other cars, refers to the necessity of basing such allowances on the average expenses of shipper furnishers of cars. The decision of the Circuit Court of Appeals, in referring to the same thing (see p. 21, *supra*) apparently considered that the Elkins Act's purpose of uniformity in rates justified application of the 1.5-cents published allowance in the case of the Oil Works because, as it in effect said, any allowance determined by the Commission and published was bound to yield a profit to certain shippers in many cases. But, whatever may be the necessities in connection with tariff publication, such Elkins Act's purpose of uniformity in rates and charges is, as above stated, a different thing from uniformity of allowances paid to shippers out of the rates for supplying facilities of transportation. In fact, individual allowances exactly measuring the costs of particular shippers in furnishing cars, would not disturb uniformity of application of the rates, whereas allowances based on average costs do have that effect in varying degree. In the *Terminal Allowance cases* (*U. S. v. Wabash R. Co.*, *supra*, and others) allowances covering the "spotting" of cars at unloading points within the plant enclosures of large industries were published in the carrier's tariffs (and under requirement of the Commission), but they were individual allowances based on the widely differing expenses entailed at the various industries involved.

as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

The use by the Commission of the basis of actual costs for allowances under section 15 (13) of the Act dates back many years and the Commission's action predicated thereon has been upheld by the Court in other cases. As early as its 3rd Annual Report to Congress, 1889, (pp. 15–18) the Commission pointed out that excessive allowances to shippers for furnishing private cars resulted in rebates and discriminatory abuses and, in succeeding reports to Congress, it repeatedly referred to the same thing with recommendations for legislation. 7th Annual Rep., 1893, pp. 58–67; 17th Annual Rep., 1903, pp. 22–26; 19th Annual Rep., 1905, pp. 10–11; 20th Annual Rep., 1906, pp. 48–49. In its 1905 Annual Report, similarly as in prior reports, the Commission referred to the abuses worked through the payment of allowances to shippers and recommended that it be given authority to determine whether allowances paid by the carriers constitute "just and reasonable compensation for the service rendered and to fix a

limit which shall not be exceeded." This recommendation was adopted and embodied in an amendment (now appearing as section 15 (13)) which was made to the Act by the Hepburn Act of 1906 (34 Stat. 590); and, since the enactment of that amendment, the Commission has consistently held that the just and reasonable allowance that may be lawfully paid a shipper should not exceed the costs of the shipper in rendering the service or furnishing the facility. *Allowances to Elevators*, 12 I. C. C. 85, 89; *Manufacturers Ry. v. St. Louis, etc., Ry.*, 28 I. C. C. 93, 101; *Chicago West Pullman & So. R. R. Case*, 37 I. C. C. 408; *Allowances to T. G. Sulphur Co.*, 96 I. C. C. 371, 377; *Refrigerator Car Case, supra.*

In *I. C. C. v. Diffenbaugh*, 222 U. S. 42, the Supreme Court set aside an order of the Commission (14 I. C. C. 315) which required (p. 46):

> the Union Pacific to desist from paying *any* allowance to Peavey & Co. on grain in which they have any interest that is not reshipped from their elevators within 10 days, or that has been mixed, treated, weighed or inspected in any of their elevators. * * *.

This order of the Commission, which the Court set aside, was entered after its order in 12 I. C. C. 85, and reflected its views, after further consideration, that the payment of any allowance whatever to a grain elevator company on that part of

the grain handled by it with respect to which it stood in the relationship of an owner and shipper, had the effect of working a rebate. This view the Court held to be a too narrow construction of the statute, but it, nevertheless, sustained the Commission's previous order in 12 I. C. C. 85, which had "cut down" the allowance "to three-quarters of a cent, estimating that to be the actual cost * * *" (pp. 45, 49).[13] Furthermore, in the case of immediate concern here (the *El Dorado Terminal Co. case*), the Court, as above shown, not only says substantially that the question of what expenses should properly be reflected in the allowance paid is one for administrative judgment, but apparently in no way questions the Commission's findings in the *Refrigerator Car case*, *supra*, which are, as appears from the findings themselves, predicated upon the rentals and other actual costs of shipper-lessees.

The Commission, in its report (R. 248–9), adopts the principles applied in the *Refrigerator Car case*, *supra*, as related to the situation here involved, and in this connection it finds:

> The present record shows how under contracts such as the one between the Oil Works and the Tank Car Corporation the Oil Works, as shipper, would reap a profit on the leased cars so substantial in amount,

[13] See reference to *Diffenbaugh Case*, *supra*, in *Lehigh Valley R. Co.* v. *U. S.*, 243 U. S. 444, 446.

> if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars.

These findings have ample support in the record. The evidence shows definitely that the level of rentals accorded the Oil Works by the Car Company were competitively induced (R. 189–193, 198) and that the contract, when entered into, gave reasonable assurance to such shipper of a substantial profit (R. 202, Exhibit No. 9, R. 234A, 235). The evidence also shows that the Oil Works' prior contract yielded it a sum over the rentals of $161,684.94 (R. 242, Ex. 9, 234A, 235) and under that contract, it paid rental for permanent cars at the rate of $32.50 per car per month (R. 191, 198). Under its succeeding contract (the one here involved), the rental paid by the Oil Works for permanent cars was reduced to $27.50 and the arrangement was continued by which it could obtain as many more cars as needed by payments on the basis of time of actual use (R. 255–260).

During the period of its earlier lease agreement (1926–1933), the Oil Works was never "called upon to make any actual payments", because "the

mileage earnings were always sufficient to cover the amount of the car hire"; and the same was true of its succeeding agreement (R. 195–196). Under this latter three-year agrement, if carried out, the sum over the rentals which the shipper would receive for furnishing the cars would amount to $64,232.03 (R. 234A, 235).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court, dismissing the bill of complaint, should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

MARCH 1946.

APPENDIX

Section 41 of Title 28, U. S. C. provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 47 of Title 28, U. S. C. provides in part:

> * * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to [three] judges and the same procedure as to expedition and appeal shall apply.

Section 6 (7) of Part I of the Interstate Commerce Act provides:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in

such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 15 (13) of Part I of the Interstate Commerce Act provides:

> If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 1 of the Elkins Act provides in part:

> That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and

the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall,

knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: * * *.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act. (49 U. S. C. 41.)

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SUPREME COURT OF THE UNITED STATES.

No. 428. OCTOBER TERM, 1945.

El Dorado Oil Works and El Dorado Terminal Company, Appellants,
vs.
The United States of America, Interstate Commerce Commission, General American Transportation Corporation, et al.

Appeal from the District Court of the United States for the Northern District of California.

[April 22, 1946.]

Mr. Justice BLACK delivered the opinion of the Court.

Appellants filed a complaint in the district court under 28 U. S. C. 47a, challenging action taken by the Interstate Commerce Commission allegedly pursuant to instructions contained in an earlier opinion rendered by this Court in connection with these proceedings. 308 U. S. 422. The district court dismissed the complaint for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order" within the meaning of 28 U. S. C. 41 28. The case is before us on direct appeal. 28 U. S. C. 345.

The following facts constitute the background of this proceeding:

El Dorado Oil Works, one of the appellants, processes, sells, and ships coconut oil in interstate commerce. Special kinds of tank cars are necessary for that distribution. The appellee General American Tank Car corporation[1] owns tank cars which it rents and leases to various shippers. In 1933 Oil Works made a contract with the Car Company to rent, for a period of three years, fifty tank cars at $27.50 per month, and such additional cars as it might need at $30 per month. The outstanding railroad tariffs, prescribing payment by the railroad of 1½¢ per mile for the use of tank cars, contained rules which provided that the mileage would be paid only to the "party" whose "reporting marks"

[1] General American Transportation Corporation has become the successor of the General American Tank Car Corporation.

appeared on the cars. During part of the rental period here in question the rules provided that "mileage for the use of cars in private ownership will be paid . . . only to the car owner—not a lessee." Since under the agreement the cars were to bear the "reporting marks" of the Car Company, and not the Oil Works, and since Oil Works was a lessee, no tariffs authorized railroad mileage payments to Oil Works. Nevertheless, under the agreement Oil Works was to receive the full mileage allowance prescribed by the tariffs. The rent Oil Works was to pay to Car Company was to be taken out by Car Company from the mileage allowances it received from the railroads and the balance was to be paid by it to Oil Works. The railroad payments proved to be greatly in excess of the rental obligations, and Car Company regularly paid the difference to Oil works, until July 1, 1934.

July 2, 1934, the Interstate Commerce Commission, after an exhaustive investigation, handed down its findings, opinion, and conclusion in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. It there drew a distinction between car owners as a class and car renters as a class. It found that car owners should have sufficient rental allowances, whether they rented to railroads or to shippers, to pay a reasonable return on investment, taking into consideration cost of maintenance, idle cars, etc. On the other hand the Commission found that car renters had no such fixed costs. The Commission's conclusion was that the rent of rented cars to a shipper, including rent and incidentals, was the only allowance the shipper-lessee should receive from a railroad, directly or indirectly, and that if he receives more the cost of transportation to him would be less than the cost of transportation to shippers generally, especially those who use cars furnished by the carriers. To make the railroad pay more for the use of a car rented by a shipper than the rent he had to pay was, according to the Commission, a violation of Section 15 (13) of the Interstate Commerce Act, 49 U. S. C. 15 (13), in that it required the railroad to pay more for the car than was "just and reasonable." The Commission was of the opinion that refunds of mileage in excess of the rent charged the shipper-lessee were the equivalent of an unlawful concession or rebate, prohibited by the Elkins Act. While the Commission's findings were limited to refrigerator cars, it stated that "the general principles stated apply equally to all other types of private cars." *Id.*

After the Commission's decision in the refrigerator case, the Car Company declined to pay over to Oil Works any part of the excess mileage. In 1935 Eldorado Terminal Company, one of the appellants acting as assignee of Oil Works, brought suit against the Car Company to recover accrued excess mileage earnings. Car Company defended on the ground that further refunds would violate Interstate Commerce legislation, particularly the Elkins Act. 49 U. S. C. 41. The district judge found that the contract was in violation of the Elkins Act, and rendered judgment for the Car Company. The Circuit Court of Appeals reversed. 104 F. 2d 993. The Car Company filed a petition for certiorari which was supported here by the Solicitor General and the Interstate Commerce Commission. Their claim that the Circuit Court of Appeals erred rested on the following major grounds: (1) The railroad's payments to Car Company, which provided no facilities to the railroad, were unauthorized; (2) since no published tariff authorized payments to a shipper-lessee such as Oil Works its only recourse to collect allowances for the cars it had furnished, was to institute proceedings before the Commission for recovery of a reasonable allowance; (3) payment to Oil Works of excess mileage earnings received by Car Company would violate the Elkins Act. In reply to the Commission's brief urging certiorari, Oil Works contended that the case did not raise a question "within the administrative or primary control of the Commission."

We granted certiorari and reversed the judgment of the Circuit Court of Appeals. 308 U. S. 422. While we rejected the Commission's contention that the district court had no jurisdiction to hear the case, we accepted its contention that determination of the validity of the challenged past practices was for the Commission. We pointed out that the tariffs approved by the Commission fixed no uniform rate to be paid by railroads to the shipper directly for the use of cars originally rented by the shipper. We pointed out further that Oil Works had never "applied to the Commission for a decision on what was a proper allowance for the cars furnished by it." We said that the Oil Works was "entitled under the plain terms of section 15 (13) [of the Interstate Commerce Act] to be paid by the carrier a just and reasonable allowance" for providing the cars. The

opinion stated that questions such as whether the shipper were "reaping a substantial profit from the cars" and whether, on the one hand the "allowances and practices" were lawful and reasonable, or on the other hand violated the Elkins Act, were all administrative problems calling for investigation and determination by the Commission. The District Court was accordingly ordered to stay its hand so that the Commission could render its decision.

On remand Oil Works and Terminal Company filed a petition with the Commission praying that it hold hearings and enter an order to the effect that Car Company could pay the mileage earnings to Oil Works without violating the Elkins Act and that such payment would not constitute a rebate or concession. The Commission found that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of sec. 15 (13) and would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable prohibited by Sec. 1 of the Elkins Act, and Section 6 (7) of the Interstate Commerce Act . . ."[2] The Commission further or-

[2] The Commission did not rule that a shipper-lessee would always be entitled to allowances equal to the cost to him of the cars he rented. The Commission's opinion makes it clear that a shipper-lessee is only entitled to receive a just and reasonable allowance for cars while they are actually used by the railroad, even though this allowance might be less than the rental paid by the shipper. On that subject the Commission said:

> "In administering the provisions of section 15 (13) we have consistently adhered to two principles, bearing in mind that we have to prescribe the *maximum* amount which the carrier might pay: (1) the amount paid should not be more than was just and reasonable for the service or instrumentality furnished, and (2) that the amount which might be paid should not exceed the reasonable cost to the owner of the goods of performing the service or furnishing the instrumentality used. Whichever of these sums was the lower marked the maximum the carrier might pay."

Here the Commission has applied these uniform criteria in such a way as to permit the shipper-lessee to receive as much as the full rental he paid. Were it not for these proceedings resulting from the Car Company's refusal to continue payments to the shipper the railroad would have had to pay it did pay 1½¢ per mile which proved far in excess of the rental. It that in other cases a just and reasonable rate would fall below the rental. It may be that in this case the rental exceeded what would be a just and reasonable allowance with respect to the use of the cars by the railroad. But this would serve to further reduce the rate to which petitioner was actually entitled; petitioner, therefore, has no interest in challenging the Commission's order on this point.

dered that the proceeding before it be discontinued. On this appeal both sides argued the jurisdictional question as well as questions going to the merits.

Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right or obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, held to be reviewable by a district court of three judges. The district court erred in dismissing the complaint for want of jurisdiction.

On the merits, appellant's major contention is that the Interstate Commerce Act and our earlier opinion in this case do not authorize the Commission to determine, as it here has done, the justice and reasonableness of mileage allowances which appellants were to receive on past transactions. The contention is that both our opinion and the Act authorize the Commission to do no more than determine what uniform allowance shippers as a class would be permitted to charge in the future. In part the argument is that insofar as the order is based on a treatment of shipper-lessees as a class apart, and on a limitation of their allowance to the cost to them of the cars they furnish, the order is invalid, in that it neither rests on, nor brings about, a uniform rate to all shippers, or even all shipper-lessees. We cannot agree with the above contentions.

First, it must be noted that the Commission itself, its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. *See e. g. Great Northern Railway Company* v. *Mer-*

chants Elevator Company, 259 U. S. 285, 291 and other cases cited in our previous opinion. And we rejected appellants' petition for rehearing which presented substantially the arguments now repeated, namely that any order the Commission might make "could only be effective as to the future," that the Commission's determination "could not affect" the contract in this case, that the Commission's action would be "futile", and that consequently our judgment and opinion would provide no "guidance" for the district court. Our first opinion, buttressed by our rejection of the motion for rehearing, was a plain authorization for the Commission to determine the justice and reasonableness of the past allowances to this shipper. The Commission did not have to establish future uniform rates to determine the questions we sent to it. Consequently, insofar as appellants' argument is that the Commission failed to treat all shippers or all shipper-lessees uniformly because it did not fix future uniform rates, the answer is that it was not required to do so.

Insofar as appellants' argument as to lack of uniform treatment of shippers and shipper-lessees seeks to attack the basis of the Commission's finding that the past allowances here were unjust and unreasonable, it also lacks merit. We think the Commission's finding was based on a uniform treatment of all shipper-lessees. While it is true, as appellants contend, that under the Commission's rule different shipper-lessees might receive different allowances, the rule is uniform in that it permits no shipper-lessee to receive allowances exceeding the rental he pays. All shipper-lessees are prohibited from making profits at the expense of the railroads on cars rented to transport goods in interstate commerce. Since the facts before the Commission were enough to enable it to find that such profits amount to rebates to shipper-lessees which result in a discrimination against shippers that own cars or use cars furnished by the railroads, the Commission was justified in treating shipper-lessees as a class apart. As the Commission pointed out in its Refrigerator case, the history of railroad practices shows that rebates, concessions and favoritism have frequently grown out of the private car system. Notwithstanding the very great transportation service supplied by private cars, designed and equipped to meet shippers' needs, the Commission acts within its power when it attempts

SUPREME COURT OF THE UNITED STATES.

No. 428.—October Term, 1945.

El Dorado Oil Works and El Dorado Terminal Company, Appellants, vs. The United States of America, Interstate Commerce Commission, General American Transportation Corporation, et al.

Appeal from the District Court of the United States for the Northern District of California.

[April 22, 1946.]

Mr. Justice Douglas dissenting in part.

I do not think it should be left to the shipper and the car owner to determine what portion of the tariff paid by the railroad should be paid to the shipper. But that is exactly what the Court permits when it measures the shipper's allowance by the amount of rental he has agreed to pay the car owner.

As Commissioner Splawn pointed out in his dissent from the opinion of the Interstate Commerce Commission (258 I. C. C. 371, 382-383), the Commission in following this course failed to comply with our opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. We there said (pp. 429-430):

> "As the Circuit Courts of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless as the allowances to be made them by the carriers for the use of such cars must be the subject of published schedules and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission."[1]

[1] Sec. 15 (13) of the Interstate Commerce Act, 49 U. S. C. § 15 (13) provides:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation or

Unless that course is followed, a situation is sanctioned in which concessions and discriminations condemned by § 1 of the Elkins Act, 32 Stat. 847, 34 Stat. 587, 49 U. S. C. § 41, are likely to thrive.

There is a further objection to the course which the Court sanctions. As stated by Commissioner Splawn in his dissenting opinion (258 I. C. C. at 384):

> "It is elementary that the form of an allowance for the use of cars must be such as to reflect the extent of the use by the railroads of the facilities furnished. Whenever we have had occasion to determine such allowances, we have prescribed either per diem or mileage allowances. The railroads cannot be held responsible for the amount of rent reserved by the Car Corporation in an agreement with the shipper as the car may be left idle during the entire period. The car has value to the railroad only when it is used in transporting lading and results in the payment of freight charges."

Any allowance based on cost to the shipper rather than on the use of the facility furnished violates that principle.

Only an appropriate uniform rate would obviate both of the objections I have mentioned.[2] I would remand the case to the Commission so that it could now do what, according to my understanding, we originally intended it to do in accordance with the requirements of § 15 (13) of the Interstate Commerce Act.[3]

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furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

[2] The Commission's finding was "That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 2, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation."

There are no facts of record which show the relationship between the rental paid and the extent of the use by the railroads of the facilities furnished. The Commission made no findings in that regard.

Whether a uniform rate which is just and reasonable would be greater or less than the rental is wholly conjectural on the present record.

[3] Note 1, *supra*